IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1172

KENT MILNER, d/b/a/ BELVEDERE DRIVING SCHOOL, ET AL.,

Petitioners,

v.

COLONEL R. H. BURSON
DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Respondents.

MEMORANDUM OF RESPONDENTS SUGGESTING THAT THE CAUSE IS MOOT

The Respondents in the above-entitled case file this memorandum to advise the Court of certain facts which, in Respondents' view, render this cause moot.

The questions which the Petitioners, who are commercial driver training schools and instructors, seek to raise in this review are two:

"(1) Did the Court below err in holding that the District Court's injunction encompassed 'pending'

as well as future state prosecutions, thus raising the problems considered by the Supreme Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971) and by the Fifth Circuit Court of Appeals in *Becker v. Thompson*, 459 F. 2d 919 (5th Cir. 1972).

"(2) Did the Court below err in holding that even where the action for declaratory relief was brought in the District Court several months prior to the institution of state criminal proceedings against the Petitioners, the District Court should not have considered issuance of an injunction in aid of its jurisdiction under 28 U.S.C., Section 2283, without having first applied the *Younger* restrictions regarding *interference* in the state criminal proceedings?" (Petition for Writ of Certiorari, hereinafter "Petition," pages 2-3).

Both of these questions necessarily relate to that portion of the State's statute which formed the basis for the controversy. The statute is The Driver Training School License Act of Georgia (Petition, pages 1D-6D) and particularly Section 4(b), which requires certain educational qualifications for instructors' licenses:

"Every person in order to qualify as instructor for a driving school shall meet the following requirements:

* * *

(b) Must present to the department evidence of credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors

in the public schools of Georgia." (Petition, page 4D).

The licenses, which are required of all driving instructors for hire, are to be issued annually, a fee is to be charged, and the commercial schools, which are also required to be licensed under the Act, are not to employ unlicensed instructors. In addition to the administrative sanctions of refusing, revoking, cancelling, or suspending licenses, the Act provides a criminal sanction by making it a misdemeanor to violate any of its provisions. (Petition, pages 1D-7D).

In August 1970, Plaintiffs sought a judgment declaring that the educational requirement was unconstitutional and enjoining its anticipated enforcement, which it was alleged would begin September 1, 1970.[1] The complaint was amended on September 29, 1970, to complain that the educational requirement was being unconstitutionally applied to Plaintiffs because it was not being applied to teachers in the public schools. No state court prosecutions were then pending, however. The thrust of the relief sought was an obliteration of the educational requirement so that the instructors could obtain State licenses without meeting the educational qualification. They simply sought to excise it from the statute.

A three-judge court ruled that this portion of the Act was not unconstitutional on its face. (Petition, pages 1C-6C). Subsequently, a single-judge court held that the statute, insofar as the educational requirement was

[1]Although the Act was to be effective beginning October 19, 1968, state court action had restrained enforcement between May 20, 1969, and September 1, 1970. Enforcement was federally restrained beginning August 25, 1970.

involved, was being applied unequally to commercial school instructors as opposed to instructors in exempted schools (i.e., accredited elementary and secondary schools, colleges and government-operated driver schools. See Section 10 of the Act, Petition, page 6D), due to the State's construction of the Act. The court did not issue a declaratory judgment but did enjoin enforcement of the educational requirements against Plaintiffs and restrained continued prosecution of existing and future citations. (Petition, page 6B, and order of July 14, 1971).

Only one Plaintiff, David Currier, had received citations at the time of the single-judge court's order. He was to appear in a State court on the two citations, issued after the three-judge ruling of constitutionality, on the day after the single-judge court hearing began.[3]

The educational requirement provision of the Act has now been changed. By Ga. Laws 1973, H.B. 539, the General Assembly liberalized the educational requirement by providing an alternate method of compliance so as to allow instructors to completely avoid the college courses which have so strenuously been fought in this suit. Instead of requiring, in effect, three college courses of fifteen hours credit, instructors can qualify instead by simply passing an examination. The revised requirement, which was brought about by amending the Act so as to strike the section complained of and insert in lieu of it a new section, provides:

"(b) Must present to the department evidence of

[3]Although Kent Milner received a citation and was to appear several weeks thereafter, his citation was to him as an instructor, whereas his position as a plaintiff was only in his capacity as a driving school, so he did not occupy the position of a prosecuted instructor in this case.

credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors in the public schools of Georgia or satisfactory performance on a written, oral, performance or combination examination administered by the department testing both knowledge of the field of driver education and skills necesssary to instruct and impart driving skills and safety to students. The examination shall be administered quarterly or upon the written application of four or more prospective licensees. The examination fee shall not exceed twenty-five dollars."

This will become effective July 1, 1973 (Ga. Code Ann. §102-111). Consequently, no citations can thereafter be issued for non-compliance with the old requirement, nor can there be any other kind of enforcement thereof. The inquiries posed by Petitioners focus on the authority of the single-judge district court to grant injunctive relief in this case against enforcement, by whatever means, of the educational requirement. The original relief sought by all Petitioners, as well as the entirety of the original complaint, is moot because of the change in the very section of the statute complained of.

Although it is not impossible to grant the relief ultimately sought by the Petitioners, that is, the declaration that the statute is unconstitutionally applied and injunction against its enforcement, such relief would be an empty vacuum. This obviously results because Respondents would not be authorized to enforce the provision anyway as of July 1, 1973. They are presently under restraint from doing so.

This Court must review the judgment below in light of the Georgia statute as it now stands, not as it once did. *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed 2d 214 (1969), citing *Thorpe v. Housing Authority*, 393 U.S. 268, 281-282, 89 S.Ct. 518, 21 L.Ed 2d 474, and others. Under the statutes as currently written, Petitioners are not compelled to meet the educational requirements about which they complain. They have an alternative. Thus the case has lost its character as a present, live controversy of the kind that must exist if the Court is to avoid advisory opinions on abstract propositions of law. See *Hall v. Beals, supra*, 396 U.S. at 48.

If the case is considered as not rendered moot, and Petitioners were to ultimately prevail in the maze of procedural tangle engulfing this case, the most they could achieve would be a declaration that a now-replaced statutory provision is unconstitutional as it was construed by the State officials, a hollow injunction against its enforcement, and an injunction against the continued prosecution of the citations issued to Plaintiff Currier while the federal suit was pending. The statutory amendment renders absolutely moot the primary complaint and the effort of Petitioners to avoid compliance with the education requirements. All of the complaints made by the Petitioners (and this is not a class action: see Petition, pages 2C and 3C, page 1B), are a dead issue.

That leaves only the intervening citations against Currier, and the two questions sought to be presented by Petitioners would not survive in a review of this unseparated aspect of the case. The first question, as a matter of fact, seeks to deny that the district court

order was bottomed in part on these pending State prosecutions. It depends for resolution on the potentiality of future prosecutions, of which there can now be none.

In line with established practice and in the light of the suggestion made here, the judgment of the circuit court should be vacated and the case returned to it for remand to the district court with direction that the judgment of the district court be vacated and the complaint dismissed on the ground that the case is now moot. *Morris v. Weinberger*, No. 71-6698, 41 L.Wk. 4309 (February 22, 1973); *Bryan v. Austin*, 354 U.S. 933, 77 S. Ct. 1396, 1 L.Ed 2d 1527 (1957).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, attorney of record for Respondents Burson, Crowe and Pope, and on behalf of all Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Memorandum Of Respondents Suggesting That The Cause Is Moot on the Petitioners by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses: Westmoreland, Hall & Bryan, Attention: John L. Westmoreland, Jr., Counsel for Petitioners, 3000 First National Bank Tower, Atlanta, Georgia 30303.

This 3rd day of April, 1973.

/s/
DOROTHY T. BEASLEY

SECOND CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, attorney of record for Respondents Burson, Crowe and Pope, and on behalf of all Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Memorandum Of Respondents Suggesting That The Cause Is Moot on the Petitioners, in printed form, by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses: Westmoreland, Hall & Bryan, Attention: John L. Westmoreland, Jr., Counsel for Petitioners, 3000 First National Bank Tower, Atlanta, Georgia 30303.

This ____ day of April, 1973.

DOROTHY T. BEASLEY